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Nos. 91-617, 91-618, 91-619

In The
Supreme Court of the United States
October Term, 1991

Tony AVIRGAN, Martha HONEY, Daniel P. SHEEHAN, and THE CHRISTIC INSTITUTE,
Petitioners,

versus

John HULL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *ET AL.* IN SUPPORT OF PETITIONERS

Respondent Singlaub, through his counsel of record, opposed the filing of the attached brief *amicus curiae*. Accordingly, *amici curiae*[1] (certain national religious organizations), by their undersigned attorney and pursuant to Rule 37 of the Rules of the Supreme Court, respectfully move this Court to grant permission to file the attached *amicus* brief. The brief is being submitted within the time allowed petitioners, whose position it supports.

These organizations request leave to file a brief *amicus curiae* in the matter of *Avirgan v. Hull* so that this Court may consider arguments for reversing the orders below assessing sanctions against plaintiffs' and their counsel. Each of the *amici*[2] herein has interests which may be affected by the decision of this matter, and those interests are distinct from the interests of the parties to this matter. Because the perspective and issues presented herein were not addressed in depth by the petitioners, *amici* believe that the Court and the interests of justice will be served by consideration of this brief *amicus curiae*.

Amici seek a resolution of the questions, "May injured

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[1]*Amici curiae* herein consist of the following organizations: National Council of Churches of Christ in the U.S.A., Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious (Executive Committee), the Maryknoll Fathers and Brothers, and the General Conference Mennonite Church.

[2]The specific interests of the *amici curiae* are set forth in Appendix A.

persons seek the aid of the court to discover evidence as to the persons responsible for their injuries?" "Will the court lend its aid even if a preliminary inquiry discloses the possibility of involvement by high officials of the executive branch who may interpose claims of privilege?" The plaintiffs' claim for relief in this matter was not based upon any views that they may have had on United States foreign policy, but their rights under the law. The plaintiffs pursued their case under circumstances which included Executive branch officials lying to Congress about their activities in Central America, the shredding of documents, and the withholding of much relevant evidence by agencies of the Executive branch. Against such opposition, the plaintiffs' sole hope for legal compensation was to resort to an independent judiciary to compel the production of evidence for determination of their case by a jury.

The sanctions order entered in this case demonstrates that the effectiveness of a judicial remedy depends in large measure on the careful exercise by the courts of their power to compel the production of evidence. While investigations and the discovery of evidence might be categorized as the job of the public prosecutor, the wisdom of the checks and balances in the United States government can be seen in part in the ability of courts to order discovery without the aid, and even with the opposition of, the Executive. The disposition of the appeal in this matter tests whether the courts of the United States remain independent sources of such power that can be used as a safeguard against failures in the Legislative or Executive branch.

The *amici* have a strong interest in maintaining access to the courts for parties such as the plaintiffs in the underlying action. *Amici* also have an interest in access to the assistance of counsel, such as the Christic Institute who served as private attorneys general in the case below. In enacting the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 28 U.S.C. 1964, Congress

intended to encourage private attorneys general. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 105 S.Ct. 3275, 3283, 87 L.Ed.2d 346 (1985). The imposition of sanctions in this matter deters private parties from vindicating public interests, both because of the unreasonable standard for "competent evidence" prior to the filing of a complaint, and the staggering size of the award.

In sum, *amici* ask this Court to protect access to legal remedies where the Executive has failed to "take Care that the Laws be faithfully executed." U.S. Constitution, Art. II, § 3. This is a matter not only of private interest to the plaintiffs, but a matter of public interest in maintaining the integrity of the Constitutional scheme of government. History has demonstrated that no one branch can be trusted entirely to safeguard the liberty of the American people, and demonstrated as well the effectiveness of a Constitution which so divides the powers and responsibilities of governing that failures and abuses in one branch can be corrected by the vigorous exercise of the remedial powers of another.

CONCLUSION

Because of the significance of this case to meaningful access to the Federal Courts, *amici* request leave to file a brief *amicus curiae* with the Court.

Respectfully submitted,

December 16, 1991

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QUESTIONS PRESENTED

I. Did the district court and the panel err in requiring the petitioners' pre-filing inquiry to obtain the sufficiency of evidence which should be obtained through discovery?

II. Did the district court and the panel err in failing to consider Congressional intent to encourage private litigators to use discovery under the RICO statute as a safeguard against corruption?

III. Did the district court and the panel err in failing to consider the circumstances under which petitioners conducted their inquiries prior to filing the complaint?

IV. Does the district court decision create an appearance of improper consideration of the political implications of plaintiffs' case?

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INTEREST OF *AMICI CURIAE*

Amici curiae are religious organizations committed to working for a more just, equal and humane society through peaceful and democratic means. As strong advocates of social justice and government accountability, *amici curiae* believe that open access to the civil court system for litigants challenging ill-conceived or illegal governmental activity is central to the health and survival of the democratic system of government. The imposition of sanctions in this matter deters private parties from vindicating public interests, both because of the unreasonable pre-filing evidentiary standard propounded, and the staggering size of the award.

Anyone concerned for the robust operation of democracy cannot but be distressed to see the federal courts fail to exercise an independent role in supporting citizen action to apprehend wrong-doing by those in high places. In this instance two journalists (and a public-interest law firm), at great risk to themselves (as evidenced by their injury in the bombing of a press conference that is the very gravamen of their complaint), uncovered the edges of an elaborate illegal operation involving officials of the U.S. government and their confederates in gun-running and drug-trafficking. Their acumen has since been vindicated by the indictment and conviction of numerous participants in that cabal. But rather than being acclaimed and rewarded for their role as "private attorneys general" in unearthing this criminal activity, the plaintiffs in this case have been criticized by the courts for their temerity and saddled with an incredibly outrageous financial penalty! It defies belief that the defendants in this case, who responded to this suit with indignation and sought shelter behind various claims of privilege, but nevertheless were (subsequently) made to answer for their offenses, first intimated in this suit, are now to be rewarded by sanctions against those who first sought to call them to account. That is only the opposite of the way things ought to be, and the

Supreme Court now has a final opportunity to set them straight, so that the self-corrective processes of democracy will be reinvigorated rather than stifled by judicial action.

Because of the significance of this case to meaningful access to the federal judiciary by victims of governmental malfeasance, *amici* respectfully urge this Court to grant petitioners' applications for certiorari.

STATEMENT OF THE CASE

The district court ruled and the panel affirmed a sanction in excess of $1 million against the petitioners Tony Avirgan and Martha Honey. That sanction was imposed jointly and severally against them and their lead counsel, petitioner Daniel Sheehan, and his public interest law firm and employer, petitioner Christic Institute. As used herein, the term plaintiffs shall mean only petitioners Avirgan and Honey; the term petitioners shall include plaintiffs, Sheehan and Christic. *Amici* adopt the statement of the case included in the brief of petitioners Tony Avirgan and Martha Honey.

SUMMARY OF THE ARGUMENT

The sanctions order at issue here represents not a failure by plaintiffs or their counsel to fulfill obligations of litigants, but a failure of the district court to fulfill its responsibilities in the exercise of judicial authority. The plaintiffs' case called upon the judicial branch to protect the interests of private citizens who suffered real injury in the course of events that became the subject of an intense political debate. Plaintiffs could not turn to the Legislative or Executive branch to remedy that injury, as those coordinate branches were principally concerned with public policy, and in any event lacked the power to compensate for private injury. Their resort to the judicial branch has resulted, not in the production of evidence relevant to their case, but punishment

for raising a matter that caused controversy.

The political controversy that has been labelled "the Iran-Contra affair" increased the need for the courts to function as a truly independent branch of government, compelling the production of relevant evidence regardless of political consequences. In circumstances in which the Executive and Legislative branches' handling of the Iran-Contra affair has generated distrust and public skepticism, the action of the district court in punishing plaintiffs and their counsel for bringing this suit creates the impression that their punishment is based not upon an absence of evidence required by law, but upon the district court's resentment of the political controversy surrounding the case.

The sanctions order at issue here strikes at the integrity of the judicial process. This ruling imposes on plaintiffs, as a condition of admission to the court, that they must first obtain evidence normally gathered through the discovery process. Such a rule would destroy the effectiveness of civil litigation generally, and particularly its function as a safeguard against the failure of public prosecutors to bring to the courts cases involving violations of law by public officials or their political associates.

The attempt by the court below to shift its responsibilities to the plaintiffs is not only in conflict with the principle that private attorneys general are to be encouraged to use the courts to remedy legal wrongs, but also suggests that the judicial branch lacks the independence to uncover facts which may be embarrassing to political officials in the other branches.

This Court must send the strongest possible signal of disapproval to correct this misapplication of the law. It is vital that this Court set forth clear standards to prevent future abuses in the application of punitive provisions of procedural law.

ARGUMENT

I. The District Court and the Panel Erred in Requiring the Plaintiffs' Pre-filing Inquiry to Obtain the Sufficiency of Evidence Which Ordinarily Should Be Obtained Through Discovery

The district court's order of February 2, 1989, affirmed by the Eleventh Circuit panel, *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), stated as a basis for the award of costs and fees its finding that:

> The attorneys for the plaintiffs, the Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint.

Avirgan v. Hull, 705 F. Supp. 1544, 1545 (S.D.Fla. 1989). This statement is apparently an interpretation of the standards of Rule 11, 28 U.S.C. 1927, or the "bad faith" exception to the American Rule, though it badly misstates those standards. By its use of the term "competent" to modify "evidence," the court has effectively replaced the "well grounded in fact" standard of Rule 11 with a hurdle that precious few complaints will clear. By requiring a plaintiffs' attorney to have "prior to suing" not only "knowledge, information and belief," but "competent evidence," the district court has held that a plaintiff must possess admissible evidence sufficient to prove their case prior to the filing of a complaint and discovery.

This evidentiary standard makes a mockery of court rules governing the discovery of evidence. Discovery is designed to employ the powers of the court as a device for ascertaining the facts prior to the time of trial. *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 389 (1947). The

provisions for subpoenas (Fed.R.Civ.P. 45) and compelled discovery (Fed.R.Civ.P. 37) make clear that the court is not to be a mere passive bystander, but that "if a plaintiff has a case he should be aided in fishing it out..." (emphasis in original) James A. Pike, John W. Willis, "The New Federal Deposition-Discovery Procedure," 38 Col.L.Rev. 1179, 1194 (1938). The reasoning of the district court and the panel are not only inconsistent with the basic philosophy of the rules governing discovery, but with the express guidance of the Eleventh Circuit; "The reasonable inquiry standard of Rule 11 does not preclude plaintiffs from establishing the merits of claims through discovery." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987)(in banc).

Here, the district court expressed reluctance to fulfill its responsibilities to supervise discovery:

> You all have vastly more experience than I do with discovery problems. I don't deal with them and I haven't in a long time ... I may have to start saying, all right, you say you can't agree, you say this [is] a real serious legal issue and we will sit down and we will go through it. If I find it is not, then somebody is going to get taxed with costs and fees. I don't say to you that I am going to do that. I say to you the time may be coming because I can't keep on with all this discovery mess that you all are throwing at each other. So I caution you about that. [Transcript of Hearing before Judge King, *Avirgan v. Hull*, Case No. 86-1146, Oct. 28, 1987, p. 50-51.]

This is strong evidence that the district court has actually punished plaintiffs for seeking the aid of the court in discovering evidence. Regardless of how impatient a court may become with acrimonious proceedings, the court cannot impose upon a plaintiff the full responsibility for discovering evidence before initiating proceedings in which the court

shares responsibility for assisting in the discovery of evidence.

The district court's attempt to substitute a requirement of proving a case through a pre-filing inquiry, rather than through properly supervised discovery, has the effect of closing the doors of the courts. This violates fundamental values of the American justice system:

> Freedom of access of the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. . . . [T]he strong presumption is against the imposition of sanctions for invoking the processes of the law.

Talamini v. All-State Insurance Co., 470 U.S. 1067, 105 S.Ct. 1824, 1827-1828, 85 L.Ed.2d 125 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, concurring), quoted in *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988).

So long as this million-dollar sanctions order stands, it is a warning to injured parties that they should not turn to the courts to ferret out the truth, if those who injured them have had the assistance of powerful friends to aid in hiding evidence. Such a standard not only makes discovery irrelevant as a legal procedure, but effectively closes the doors of our courts to many persons who have suffered compensable harm.

II. The District Court and the Panel Erred in Failing to Consider Congressional Intent to Encourage Private Litigators to Use Discovery Under the RICO Statute as a Safeguard Against Corruption

The need for availability of the powers of the courts to discover evidence, while clearly strong in any civil litigation, is heightened in those situations where Congress has acted to encourage private attorneys general to bring suits to safeguard important public interests. In awarding sanctions, the court below failed to consider the importance of Congress' decision to encourage civil plaintiffs to use the power of the courts to discover and deter criminal enterprises. Like the attorney fee provisions of the Civil Rights statutes, these provisions were intended to encourage "private attorneys general" to bring suits to vindicate public interests. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 105 S.Ct. 3275, 3283, 87 L.Ed.2d 346 (1985).

Where, as here, the circumstances of the case suggest the potential of corruption or improper influence of government officials, the need for independent exercise of the judicial power to compel discovery is further increased. While the civil provisions of RICO, 18 U.S.C. 1964(c) "fill prosecutorial gaps," *Sedima, supra*, the legislative history of RICO demonstrates that the statute's remedial purposes also included safeguarding against the corruption of public prosecutors. In adopting the bill that included RICO, Congress expressly found that criminal enterprises were using their power "to subvert and corrupt our democratic processes." 84 Stat. 922-23 (1970).

The need for judicial deference to Congressional determinations of the public interest in the application of Rule 11 has been noted elsewhere:

> The existence of a pro-plaintiff fee-shifting statute designed to ensure the availability of a pool of competent counsel is an independent reason to use Rule 11 sparingly, in order to avoid both conflict with Congress' policy judgments and challenges to the Rule's validity. (citation omitted)

American Judicature Society, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, at 72 (1989).

Prior to its entering of sanctions, the district court had notice that several of the defendants in this matter had been indicted for offenses alleged in the civil complaint. Defendants Secord and Hakim were indicted by a Washington, DC grand jury on March 16, 1988 on charges that included allegations of conspiracy with certain government officials to commit crimes resembling the allegations in the plaintiffs' complaint here. Case No. CR-88-0080-GAG, March 16, 1989, United States District Court for the District of Columbia. Secord and Hakim moved the district court for a delay in this civil case because of the conflict with their criminal trial. Both were convicted after entering guilty pleas in November, 1989.

Two government officials who cooperated with the enterprise alleged in the underlying case have been convicted for those activities; Oliver North, in Case. No. CR-88-0080(GAG), United States District Court for the District of Columbia, judgment docketed July 13, 1989 - this conviction was reversed on appeal, *U.S. v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990) when the court determined that testimony used against North at trial was tainted by testimony he gave to Congress three years earlier under a grant of immunity; and Robert MacFarlane in Case No. CR-88-0078(AER), United States District Court for the District of Columbia, judgment entered March 8, 1989. A

third government official was convicted on similar charges on April 7, 1990; John Poindexter, CR-88-0080-GAG, United States District Court for the District of Columbia (Poindexter's conviction was later overturned on the same grounds as North's conviction, *U.S. v. Poindexter*, 1991 WL 235749 (D.C. Cir. Nov. 15, 1991). Oliver North and John Poindexter were indicted together with defendants Secord and Hakim.

A fourth official, Joe Fernandez, was indicted on related charges, Case No. 89-150-A, United States District Court for the Northern District of Virginia. The Fernandez case was dismissed on November 24, 1989 after United States Attorney General Richard Thornburg blocked the disclosure of classified information. *U.S. v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).[1]

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[1]The Independent Counsel, Lawrence Walsh, complained to Congress that "[t]he Administration's actions in *United States v. Fernandez* and in other Iran/Contra prosecutions underscore the need for objective standards to govern the release of classified information in criminal prosecutions...[there is] an appearance of conflict of interest [because] the agency refusing disclosure [the CIA] is itself a subject of investigation." Independent Counsel's Supplement to Previous Reports Regarding *United States v. Fernandez*, submitted to the Intelligence Committees and Judiciary Committees of both houses of Congress on October 24, 1990.

Since the opinion of the Eleventh Circuit panel upholding sanctions, three additional high-ranking executive branch officials have been indicted, and two convicted, for obstructing official investigations of the enterprise defined in plaintiffs' complaint: Claire George in Case No. CR-91-521-RCL, United States District Court for the District of Columbia; Elliot Abrams in Case No. CR-91-575, United States District Court for the District of Columbia, judgment entered October 7, 1991; Alan D. Fiers in Case No. ____, United States District Court for the District of Columbia, judgment entered on July 9, 1991.

The need for civil litigation as a check against corruption of government officials is no mere abstraction in the *Avirgan* case. The evidence of complicity by government officials in illegal activity is the strongest possible demonstration of the need for independent judicial consideration. The dangers of government corruption, and the Congressional determination of the importance of remedying them through civil litigation, should have led the district court to exercise the greatest receptiveness in evaluating the reasonableness of the plaintiffs' case at the time of filing, when it appeared much of the evidence was in the hands of government officials with an interest in hiding their roles. Instead, the district court took a cavalier attitude toward discovery, as noted above, and punished the plaintiffs for failing to assemble the sufficiency of evidence which should have been gathered through court-supervised discovery.

III. The District Court and the Panel Erred in Failing to Consider the Circumstances Under Which Plaintiffs and Their Counsel Conducted Their Inquiries Prior to Filing the Complaint

While the standards applied by the district court would be inappropriate under any circumstances, they are particularly egregious in the circumstances of this case. In awarding sanctions under Rule 11, courts have been cautioned to "avoid the wisdom of hindsight," Fed. R. Civ. P. 11 advisory committee note, and to judge the conduct of counsel under the particular circumstances of the case:

> Thus, what constitutes reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information as to the facts underlying the pleading, motion or other paper; whether the pleading, motion, or other paper was based on a

> plausible view of the law; or whether he had depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. 11 advisory committee note. As the 1983 amendment to Rule 11 was based upon the inherent power of the court as exercised under the "bad faith" exception, a similar caution should guide the application of sanctions under the "bad faith" exception as well. Fed. R. Civ. P. 11, notes of advisory committee.

Absent subpoena power, attorneys cannot be held to know every fact, but rather the facts that would become known through a reasonable inquiry. Where circumstances make the discovery of evidence exceptionally difficult, the rules should be interpreted to permit the filing of a complaint. Discovery would then serve its intended purpose of obtaining the evidence that would either support the complaint or lead to its amendment to conform to the discovered evidence.

An obvious impediment to the investigation by the plaintiffs was the fact that the crimes which caused their injuries took place in foreign countries. Indeed, the bombing which took place in Nicaragua was the result of shipments of explosives from the United States into Costa Rica, while the evidence of travels by the bomber involved stops in many other countries. Thus, any responsible inquiry into the cause of the bombing required the plaintiffs and their counsel to obtain information from many different countries, much of it from uncooperative sources. Only in the United States were there centralized sources of information subject to discovery. This was the case because United States government agencies had played key roles in investigating the bombing and because many of the defendants were residents of the United States.

Most importantly, the district court was aware that the plaintiffs, their sources and their employees were threatened

with death for revealing information about the defendants' activities prior to the filing of the complaint. This argues strongly for affording plaintiffs the relative safety of the judicial process, rather than requiring them to endure such risks to gather evidence on their own prior to any filing.

Further appreciation for the barriers to plaintiffs' inquiry should have been obvious to the court from the withholding of evidence which began once the filing of the complaint made available subpoena power and compulsory discovery processes. Numerous claims of privilege by the defendants, by government agencies and by non-party witnesses prevented plaintiffs from discovering much evidence relevant to their case. The resolution of these claims called for the most exacting inquiry, but the district court proceeded to summary judgment and even a sanctions order without resolving many of these claims.

Other circumstances after the entry of summary judgment, but before the award of sanctions, should have demonstrated to the trial court that evidence could have been produced only through compulsory process, and not the plaintiffs' unaided efforts. On June 28, 1988, prior to the entry of the sanctions order, defendant Posey was indicted by a grand jury in the Southern District of Florida for violations of the Neutrality Act based on allegations similar to those in plaintiffs' complaint. Case No. 88-6097-CR-Roettger, United States District Court for the Southern District of Florida. Since the entry of the sanctions order, defendant John Hull fled Costa Rica following an indictment in that country for drug trafficking. Information of January 12, 1989, Poder Judicial, Republic of Costa Rica, No. Inf. 052-DV-89. Since fleeing, defendant Hull, along with defendant Felipe Vidal, were both indicted for murder for their role in the bombing of the press conference which injured plaintiff Avirgan. *See New York Times*, March 1, 1990, *Washington Post*, March 1, 1990, p. A1.

In a case which faced remarkably similar difficulties in

obtaining evidence, the United States Court of Appeals for the District of Columbia overturned a dismissal of a complaint, saying:

> [D]ismissal of a complaint is not proper "when information which might be relevant to a . . . claim is unavailable for discovery.". . . Speculation about Executive privilege in this case cannot justify squelching the plaintiffs' complaint prior to any factfinding.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1513, (D.C. Cir. 1984). In the instant case, it could not reasonably have been predicted that government officials as well as individual defendants would successfully assert a wide range of privileges to block access to evidence of the particular facts which the court found determinative in its order of summary judgment. Surely if such circumstances would not justify dismissal of a complaint, they cannot justify sanctions against plaintiffs and their counsel.

Further, although this Court established a uniform statute of limitations for RICO actions subsequent to the filing of this action in May 1986, *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 107 S.Ct. 2759 (1987), at the time of filing it was not clear how much time remained for plaintiffs to assert their claim. Indeed, on appeal some defendants advanced the argument that the filing of this complaint was barred by the statute of limitations. (Joint Brief of Appellees Calero, Clines, Delamico, Hakim, Hull, Martin, McCoy, Owen, Quintero, Secord, Shackley and Singlaub, p. 72, fn. 45, Case No. 88-5720, United States Court of Appeals for the Eleventh Circuit.)

Viewing the circumstances as a whole at the time of the filing of this complaint, it cannot be said that plaintiffs or their counsel were acting in bad faith or had failed to conduct an inquiry which was reasonable under the

circumstances. Under very difficult circumstances the plaintiffs and their counsel obtained information amply justifying the filing of their complaint. To apply Rule 11 in a manner consistent with its intent as interpreted by the advisory committee notes, under the difficult circumstances in which the plaintiffs found themselves the district court should have required a lower quantum of evidence to be obtained prior to filing.

IV. The Courts' Decisions Create an Appearance of Improper Consideration of the Political Implications of Plaintiffs' Case

Finally, defendants have repeatedly characterized this case as "political" in an attempt to confuse the court about the true nature of the dispute.[2] While the case clearly has political implications, the case does not center on "political questions" which cannot be resolved by the courts. See, *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962).

Plaintiffs' goal in this case was compensation for the injuries they suffered, a goal which could not be achieved through legislative inquiry or a criminal prosecution.

This Court must make clear beyond dispute that the political views of the plaintiffs or of those who attacked them are irrelevant to the resolution of this case. The award of sanctions in an order so lacking in references to legal standards but bristling with hostile characterizations of the

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[2] See, e.g.: "[t]he Federal Judiciary was not designed to provide a publicity forum for scandalous propaganda aimed at changing public opinion regarding the Nicaraguan Civil War." Defendant Posey's Motions for Dismissal and to Strike docketed June 19, 1986. The complaint is "a rambling discourse of political theatre." Defendant McCoy's Motion to Dismiss and Motion to Strike docketed July 30, 1986.

actions of plaintiffs' counsel creates the impression that the district court sought to punish the plaintiffs and their counsel for bringing a case fraught with political implications.

The judicial branch should not avoid cases that may cause political embarrassment to officials of another branch, but should take greater than ordinary care to demonstrate strict adherence to rules of procedure in order to maintain public confidence in the integrity of the courts. Cases touching on political questions require "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. Where parties have repeatedly sought to inject inappropriate political considerations into the decision of a case, and the proper resolution of the case has significant political implications, the "discriminating inquiry" of the court should have made clear that principles of law rather than politics governed its decision. The district court failed to exercise this level of care in its sanctions order. That order's failure to apply the standards of the law to the facts leaves the impression that the order was not based upon the authority of the cited law, but upon political animus toward plaintiffs and their counsel. To maintain public confidence in the integrity of the judicial system, the reversal of this sanctions order must be clear and emphatic.

The *Avirgan* case has served important public interests by provoking questioning about the nature and extent of military efforts directed against Nicaragua. Congressional and Executive branch inquiries have focused on violations of law by government officials rather than individuals, though defendants Secord, Hakim, Hull, and Posey have each been indicted for offenses included in those alleged by plaintiffs here. The public prosecutions have pursued theories of criminal liability different from the theories relied upon by plaintiffs in large measure because the public prosecutions have been blocked by claims of national security. The aspects of national security which are claimed to be threatened are essentially political in nature, as they concern

the foreign relations of the United States. It cannot escape judicial notice that these matters have been at the center of intense public debate regarding both the foreign relations of the United States and the conduct of those relations.

Public debate is the lifeblood of democracy. However embarrassing to some officials, the full, public consideration of the covert war against Nicaragua ultimately will be a healthy development for our political system.

The defendants repeatedly objected to any public discussion of the public policy implications of this case. These actions, coupled with the district court's failure to articulate reasons for its award, create the impression that the court has punished plaintiffs because their case created a political controversy. This impression is heightened by the staggering size of the award of fees, which, together with the court's criticism of plaintiffs and their counsel, has attracted negative publicity toward plaintiffs' counsel. The message sent by the court's award is not one of deterrence but destruction.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant petitioners' applications for certiorari.

Respectfully submitted,

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APPENDIX A

National Council of the Churches of Christ in the U.S.A.

The National Council of the Churches of Christ in the U.S.A. is a community of communions composed of 33 national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members appointed by its member denominations in proportion to their size and support of the Council. The Council does not claim to speak for all of those adherents, but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the Governing Board.

Church of the Brethren

The Church of the Brethren is a Christian body, with some 150,000 members in the United States and historical and ecumenical ties to many churches throughout the world. The Brethren are known for peace and service ministries. As of October 1989, the Church of the Brethren General Board has eight mission personnel serving in Central America, including El Salvador and Nicaragua, and maintains a partnership with a Nicaraguan Protestant church called the Mision Cristiana de Nicaragua.

The Church of the Brethren General Board enters as an amicus into this case because we are convinced that the legal and moral issues are significant. In 1987, the Annual Conference of the Church of the Brethren in a resolution, "Quest for Order" affirmed "obedience to human law, including obedience to the law by government itself..." (emphasis added). The waging of war against Nicaragua has been found a violation of international law by the World Court, and was a violation of our domestic law as found in the United States Constitution.

Therefore, the Church of the Brethren has an interest in this litigation, not only because of its potential affect upon our own mission program in Central America, but for the integrity of the United States government as well.

Maryknoll Fathers and Brothers

The Maryknoll Fathers and Brothers is a missionary society of priests, brothers and lay associates which, during the times covered by the allegations in the underlying litigation had Churches, chapels, mission programs and sixty-one missioners in Central American countries. These Churches, chapels, mission programs and missioners were at risk of injury from the criminal acts described in the plaintiffs' complaint. Therefore, the Maryknoll Fathers and Brothers have an interest in discovering and deterring criminal activity based in the United States but directed against nations in Central America, and therefore, has an interest in the just resolution of the underlying case.

Church Women United

Church Women United is a national ecumenical movement that brings Protestant, Roman Catholic, Orthodox and other Christian women together into one community of prayer, advocacy and service, and relates to half a million women in the United States. Working for a just, caring society, we are particularly concerned about criminal enterprises that could threaten our programs of service or our sisters and brothers in other nations with whom we are working to build greater international understanding. We therefore are adamant in opposing any restrictions which limit investigations of criminal activity such as was alleged in the underlying complaint. The Christic Institute, through its investigation of criminal activity and its filing of a complaint, has set an example for other organizations and attorneys to

take up unpopular and risky cases. We call for the reversal of the order of sanctions, and further ask that the greatest possible leeway be granted by the courts to further the intent of Congress in adopting the Racketeer Influenced and Corrupt Organizations Act so that those who bring harm to American citizens here or abroad may be brought to justice.

Disciples of Christ, Peace Fellowship

The Disciples Peace Fellowship is a religious organization directly related to the Christian Church (Disciples of Christ). During the time covered by the allegations in the underlying litigation, our organization has encouraged and/or sponsored group visits to Central America, and the religious denomination to which we are affiliated has had mission programs and personnel in Central American countries. More importantly, our church has supported the activity and work of several religious groups in Central America whose pastors and laity are citizens of those counties. All of the above-mentioned activities, programs and persons were at risk of injury from the criminal acts described in the plaintiffs' complaint.

The Disciples Peace Fellowship is a religious organization whose members and supporters are based in congregations of the Christian Church (Disciples of Christ) throughout the United States. There are pastors and laity in these churches who seek to provide service and counsel to victims of drug abuse in the United States, some of whom may even be members of these churches. These efforts to help such persons, and to prevent others from falling victim to drugs, have been overburdened by the enormous increase in the availability of drugs in the United States. This organization therefore has an interest in discovering and deterring the smuggling of narcotics into the United States as alleged in the complaint in the underlying action.

General Conference Mennonite Church

As one of the denominational sponsors of the Mennonite Central Committee (MCC), Akron, Pennsylvania, the General Conference Mennonite Church contributes workers from among its members and significant financial resources to the work of MCC in Central America, much of which is in support of the national Mennonite churches there. The General Conference Mennonite Church is a fraternal church with the Central American Mennonite churches in the Mennonite World Conference.

As of the 1988-89 report of the Mennonite Yearbook, there are 212 Mennonite churches with 10,085 members in Central America. A total of 40 MCC workers were stationed in those countries. Mennonite periodicals have carried reports of worship services of the national Mennonite churches in Central America which have been entered and disrupted by armed soldiers, and whose members have been held at gunpoint and kidnapped. Young male members of these churches have been forcibly impressed into one armed group or another, despite the long-standing public statements that all of the Mennonite churches adhere to peacemaking theology and have sought official recognition as conscientious objector churches. Anabaptist/Mennonite convictions on the way of peace date back to 1525, during the Reformation in Europe. Nevertheless, in addition to the attacks upon, national Mennonite church members, MCC church and development workers have received repeated death threats and have several times been kidnapped.

In North America, the Mennonite churches sponsor 18 hospitals and 11 mental health centers. Almost all of these offer either hospital critical care or mental health residential rehabilitation programs for drug abuse patients. The resources of these institutions have been severely strained in recent years as funds had to be diverted from other medical

and mental health care needs in order to cope with the rapid and large increase in drug abuse care needs.

With these direct involvements in the Central American conflicts and in light of the Congressional testimony and later convictions of high-placed United States officials, the General Conference Mennonite Church has followed with intense interest the lawsuit initiated by the Christic Institute of Washington, DC on behalf of the plaintiffs.